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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **DEFENDANT'S BENCH MEMORANDUM ON PRIOR RULINGS REGARDING TESTIMONY OF KENNEDY, MASCHER AND WINSLOW**

Steven DeMocker, by and through counsel, hereby respectfully provides this Court with a bench memorandum regarding the prior rulings of the Court with respect to the testimony of Theresa Kennedy, Scott Mascher and Daniel Winslow. This is not a request for reconsideration of any of those rulings as the State suggests; instead, it is merely an effort to organize a number of prior rulings in a way that is convenient for the Court and helpful in understanding the limits placed on testimony from these three

witnesses by Judge Lindberg. It is apparent, at least to the defense, that there is a fundamental disagreement between the parties with respect to the permissible scope of testimony for these three witnesses in view of the prior rulings of judge Lindberg, and that this Court needs to assist in clarifying those rulings before further testimony is adduced.

I. BACKGROUND

On December 18, 2009, the defense filed a Motion in Limine to preclude the use of police officers as experts at trial. The State responded that it did not intend to call any officers as experts a trial. On January 14, 2010 that motion was heard. At this hearing the Court ruled that a *Willits* instruction appeared appropriate with respect to shoe print impressions and possibly bike tire impressions based on the State's failure to properly preserve shoe print and bike tire impressions. The Court also cautioned the State against using language like "match" or "identical" in describing impression evidence by lay witnesses. Later the Court held that non-experts describing impression evidence may not use the phrases "no differences" or "similar."

Although the State had an expert report as early as October 2009 that "Track 2" tracked by Kennedy, Winslow and Masher was consistent with a La Sportiva brand shoe, the State did not disclose this evidence and its shoe print impression expert to the defense until February 2010. The defense sought a number of times to preclude this evidence based on the State's late disclosure and the ensuing prejudice. On April 8, 2010 the Court held that the State had engaged in discovery violations with respect to the La Sportiva shoe evidence, among other things, and struck two death penalty aggravators as a sanction.

> Generally speaking, in terms of disclosure, I have reached a conclusion, that the State's newest response is talking about, that there have been some delays in disclosure that aren't easily explained or haven't been explained, at least to my satisfaction, with regard to the discovery, and I think that

there have been some 15.1 violations, inclusive of not identifying the purported identity of the shoe print testimony to possibly or probably La Sportiva type shoes back when that was learned in October, and then that was disclosed after it was found to have some connection to the defendant, potentially.

And there are other issues that we have discussed that I have looked at on an individual basis with the individual motions, responses and replies that the parties have filed. And I have reached a general conclusion that there was a violation of the discovery rules for certain of those items.

(See April 8 Transcript.)

The following day the defense filed a motion to preclude impression experts under Rule 702. This motion focused on John Hoang, Eric Gilkerson, Sergeant D. Winslow, Detective T. Kennedy, and Commander S. Mascher. The Court held a hearing on this motion and limited the testimony of Winslow, Kennedy and Mascher.

The State has now sought to exceed the limitations of Judge Lindberg's ruling of what is permissible, non-expert tracking testimony with Kennedy. Because the defense anticipates that this issue with re-occur when Officer Kennedy resumes the stand on Tuesday and is likely to be repeated this coming week when Winslow and Mascher are expected to testify, we are offering this detailed summary of rulings and limitations Judge Lindberg identified with respect to impression evidence testimony from these three witnesses.[1]

II. WINSLOW

In the defense Motion in Limine to Preclude Officers as Experts filed on December 18, 2009, the defense noted that Sergeant Dan Winslow apparently

[1] The Court and the State treated these three witnesses as interchangeable throughout the hearings on this matter. Therefore, rulings that apply to one, necessarily apply to the other, as will be obvious throughout this memorandum. "JOE BUTNER: ... *Kennedy or Mascher, and for that matter, Winslow. I mean, they are in the same category. THE COURT: They are.*" (See February 19, 2010 Transcript 23:5-24:18, emphasis added.)

conducted his own non-expert bike tire comparisons on July 3, 2008 at the scene which he failed to properly preserve for DPS analysis. In his report he opines, "these tracks appeared be identical to the initial tracks left in the sand" of the front bike tire tracks and then after applying some other pressure the rear tire, "it again appeared identical." (Bates 000026). This testimony was presented to the grand jury by Officer Brown even though the DPS report of these identical bike tire impressions said only that the tracks were similar but that "due to the limited clarity and proper scale in the images a more conclusive association was not made." (Bates 000311). DPS also indicated they could not verify if the rear tracks were made by a deflated tire. (Bates No. 001943). The motion argued that Sergeant Winslow should be prohibited from offering opinions about the bike tire comparisons for which he is not qualified.

The State responded that Sgt. Winslow would not be testifying as an expert. (State's Response filed January 4, 2010). At a hearing on the motion, the Court ordered the State to advise Sgt. Winslow against the use of language like "match." (See January 14, 2010 Transcript: 90:25-91:1.) Also at this hearing, the Court ruled that a *Willits* instruction "would appear appropriate" regarding the shoe print and possibly the bike tire impression evidence based on the State's failure to properly preserve the evidence.

At an April 13, 2010 hearing the Court ruled that Winslow may not testify as to any comparison between the shoe prints at the scene and a La Sportiva brand shoe or to any characteristics of the tracks he tracked if his memory of those characteristics was not his independent recollection without the aid of photographs. Lastly, the Court suggested that there were foundation issues with Winslow's measurements of the tracks.

> THE COURT: And the testimony with regard to shoeprints, he is not going to say identity, he is not even going to say similar, he is not going to say that he remembered what the pattern was in the shoeprints in the manner in which a lay witness would, under Rule 701 --
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> MR. BUTNER: If he is asked "Did you look at the shoeprints at some point to compare them with what was much later

discovered, obviously -- the La Sportiva shoe," Judge, he is in a position to say "I couldn't find any difference between them." He is not the witness that is going to be presenting that kind of testimony.

THE COURT: I am going to preclude this testimony. I think to talk about it at all, rather than in descriptive terms of here is what I observed in terms of the detail of what I saw in the sand or clay or whatever it was -- I mean, he could testify to that, apparently, when he was interviewed. He didn't even testify to that. Rather, he had to, quote, "refresh his recollection," close quote, using photographs. So the question is, is his recollection really refreshed, or is he simply testifying as to what he sees now in the photograph. And I think the jury is capable of making conclusions about those things. They don't need any testimony of what his recollection was, unless he can honestly swear that this recollection had a certain pattern of shoe to it. So I –

MR. BUTNER: Judge, what he provided in his interview was that it looked to be a hiking type of boot, is what he stated in his interview.

THE COURT: I think he can say that.

MR. BUTNER: Okay.

THE COURT: But I don't think he can say anything about what the pattern was unless he had a recollection of that without simply relying on the photographs to, quote, "remember," close quote. And certainly he is not the expert to testify as to whether that shoe may -- we have another issue with regard to that, I know, but I don't think Sergeant Winslow can testify under Rule 702 as an expert. I think the measurements go to weight, not admissibility. And, frankly, the precision of his measurements is totally in question. You are going to have to lay a foundation for how he made any kind of determination as to that, and I may sustain a foundation objection, but not on a disclosure basis.

(See April 13, 2010 Transcript 12:13-14:9.)

At a hearing on a Motion to Preclude Winslow, Mascher and Kennedy on the basis of Rule 702,[2] the Court expanded the limitation from use of terms such as "match"

[2] The Motion to preclude included the following citation at footnote 2: It is also noteworthy that while the distinction between testimony that two prints match and testimony that two prints are similar may seem significant to those familiar with this type of forensic testimony, one recent study conducted in the context of microscopic

and "identity" and further precluded Winslow, as a non-expert on impression evidence, from testifying about bike track "similarities" or "differences" on April 28, 1010.

> As far as Winslow taking the defendant's bike tire out and being able to roll it and say, I am unable to see differences, that is the same as saying, I am able to see similarities. He is not an expert on that, and I won't allow that.

(See April 28, 2010 Transcript 169:3-7.)

The Court's ruling was clear that non-experts testifying about impression evidence may not use terms such as "similar", "no differences", "match" or "identity".

III. KENNEDY

The State has not offered Kennedy as a tracking expert because she has candidly acknowledged during a defense interview that she is not an expert in this field. Instead, they have sought to exceed the limitations of Judge Lindberg's ruling of what is permissible non-expert tracking testimony.

The Court made the following pretrial conclusions regarding Kennedy's testimony:

> Under Rule 701 Kennedy cannot offer opinion testimony comparing one shoeprint to another except as part of her explanation for what she did and therefore cannot testify that two impressions in an area were made from different shoes.

On January 14, 2010, counsel argued a motion to preclude officers as experts. Based on Kennedy's failure to preserve the shoe print and tire impression evidence, the Court also ruled that a *Willits* instruction "appears to be appropriate." Also at that hearing the Court indicated that Kennedy would need

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hair analysis found that jurors view both terms to be similarly probative. Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, (2008). In fact, participants viewed expert testimony presented as "similar-in-all-microscopic-characteristics" (68%) as slightly more probative that defendant was the source of the crime scene hair than expert testimony presented as a "match" (66%). *Id.* at 1165.

to be qualified as an expert to offer certain opinions regarding tracking. In light of last Friday's testimony and the numerous exchanges with the Court that necessarily had to occur out of the presence of the jury, Judge Lindberg's comments seem particularly prophetic:

> THE COURT: Well, I've heard that apparently she is going to be disclosed as a tracking expert now. I don't know *without that foundational, clearly, I don't think she can opine much of what Miss Chapman referred to*[3], and even with that expertise, I don't think one can opine about the intentions or mental processes of a person who opines that they were familiar with the area or not, that works well in novels but not so well in trials. So, in terms of shoe print comparison I think, again, 701 is limited to percipient witnesses testifying about things that are helpful to the jury that are not subject to other expertise. So all of this depends on Miss Kennedy's part of it on qualifying her as an expert, and perhaps we ought address that before the trial happens so that there's no confusion as to whether she is going to be found qualified or not qualified. We don't have to do that in the middle of trial outside the presence of the jury. (emphasis supplied).

At the end of that portion of the hearing Mr. Butner indicated that he knew Kennedy would need to be qualified as an expert to offer certain opinions on tracking.

> MR. BUTNER: I don't know if there's anything else. I think I understand the Court's ruling, and just to clarify, if I am going to seek to have testimony from Detective Page or Detective Kennedy in terms of some elevated level of expertise concerning the subject matter that we've been discussing in respect to each of them, that being computers

[3] There were several issues referred to by Ms. Chapman regarding Ms. Kennedy's possible testimony, as follows: "Certainly, tracking a shoe print and drawing conclusions about what shoe left what prints and whether those prints match and the order and direction in which those prints were made is a matter of specialized knowledge and we would suggest that she doesn't have such knowledge or training and would ask that she not be permitted to draw conclusions about those tracks or the tracking. (See January 14, 2010 Transcript, 84:25-85:7.) And later "[t]hat was just referring to the -- but there are conclusions about the order in which these tracks were made and that they went to a location and then came back and then went to another location, so part of it is the order that they were made when they were made in relationship to each other, that that's objectionable, and as a lay person's testimony and, again, she has not been to date disclosed as an expert. (See *id.*, 88:23-89:5.)

for Page or tracking for Kennedy, then we need a hearing before the Court where additional foundational-type evidence is presented to the Court to qualify them?

THE COURT: Yes. And you need to disclose that to the defense so that they're firmly aware of whether you're seeking to have somebody qualified as an expert or not.

(See January 14, 2010 Transcript, 90:3-16).

On January 22, with less than three months to trial and well after the disclosure deadline, Theresa Kennedy was disclosed as a tracking expert. On January 29, the defense filed a motion to preclude Kennedy as an expert based on late disclosure and based on her lack of qualifications as a tracking expert. At a defense interview Kennedy acknowledged that she was not an expert in the field of tracking and that her training was related more to searching for fugitives than impression evidence.

The Court held a hearing on February 19, 2010 on the motion to preclude Kennedy. By the time of this hearing the State had late disclosed Eric Gilkerson as an expert.

THE COURT: And if she says something is similar, one to the other, and here's why, because they had the Z pattern on the prints, the Z pattern on the shoe, I think that is observational, and I think that that's permissible, and I don't think you need to qualify her as an expert to testify to that.

MR. BUTNER: Exactly what I propose to do, Judge. And in regard to those other prints out there -- you know, there's the tire prints, there's the decedent's prints, and then there is those other prints that we do have an expert for, that we've just now discovered, so to speak -- that witness is an expert. We will be presenting him for qualification to the Court as such, and he would be offering an opinion concerning identity, based upon his training and education and expertise in that field.

THE COURT: Who is that?

MR. BUTNER: His name is Eric Gilkerson. He was identified in the January 29th disclosure by the State.

(See February 19, 2010, Transcript 24:20-25:12.)

The discussion regarding Kennedy's proposed limited testimony was extensive and the Court determined that the State was not offering Kennedy as an expert based on the limited description of her proposed testimony.

THE COURT: Well, this is not unlike what I have already talked about and ruled on in connection with Deputy Winslow

MR. SEARS: It is very similar, from the State's point of view, Judge. No pun intended.

THE COURT: The identity -- that's the language thing, again. I think that lay witnesses can testify about their observations. Trained witnesses in tracking can testify about their observations. Police officers can testify about their observations. But it is different than testifying to an identity between a mark and the object creating the mark, unless they are qualified as an expert. So if you think that you need to qualify her as an expert in that kind of marking and that she qualifies as an expert, I will let you make your record. If you think that it's more a matter of as a trained officer and what her observations were, I don't think you need to make that. I think the case law and the rules talk about people being able to testify about what their observations are. But I think the language is important in testifying to an identity or sameness between "X" and "Y," if you are discussing a shoe -- a particular shoe and a particular mark or print that is left from the shoe -- just like fingerprints -- fingers and fingerprints. *If you are testifying that there is an identity between the two, as distinguished from here's what the print looks like, describe it. Here's what the shoe looked like, describe it. Did they look similar? Looked similar? Was there an identity? I think that is where the line is.*

(See *Id.*,19:16-20:20, emphasis added).

And further, from the Court.

THE COURT: Well, I think I described where I believe the line is, and that is with the making of a match or an identity, as distinguished from things like lay observations or sometimes categorized as opinions, such as the speed of a vehicle and things like that, but obviously, we have had descriptions authorized with things like that. *If you keep your witnesses by pertinent questions framed with an idea of staying away from the identity making*, Mr. Butner, *I think you are allowed to bring in that testimony, and I don't think that you need to have a hearing with regard to expert qualifications.*

MR. BUTNER: Judge, I'm belaboring this point, somewhat, out of an abundance of caution. And the caution is because this, obviously, can be mistrial material. I don't want to go there. But I want to make it clear for the Court, neither of these witnesses -- Kennedy or Mascher, and for that matter, Winslow. I mean, they are in the same category.

THE COURT: They are.

MR. BUTNER: None of these witnesses are going to say something along the lines, as mentioned by Mr. Sears, that all of the characteristics are the same. They aren't going to say that. What they are going to say is -- for example, Winslow: "I rolled the tire in the dirt next to the other tire. They look very similar to me. I couldn't tell the difference. I saw no differences." Similarly with Kennedy. She saw those shoes after the fact, after she did the tracking. She saw pictures of those shoes that were worn by the decedent. She looked at those shoes and she said "Those look like the same marks out in the dirt that I was tracking." I mean, is that identity? No, I don't think that is identity and she's not going to say they're a match.

THE COURT: I would say to be more clear in what I am ruling, I would stay away from things that say "*same*," "match," or "identity."

MR. BUTNER: Right.

(See *Id.*, 23:5-24:18, emphasis added.)

(2) Under Rule 701 Kennedy cannot offer opinion testimony comparing one shoeprint impression to another except as part of her explanation for what she did and therefore cannot testify that two impressions in an area were made from different shoes.

On April 13 the Court made clear that tracking testimony should not include a description of the impressions, as that is more properly shoe print comparison testimony.

> THE COURT: But in terms of following -- you represented earlier that he [Mascher] was a tracking expert, not a shoeprint expert --
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> MR. BUTNER: That's correct, Judge.
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> THE COURT: -- and so following a set of tracks from Point A to Point B to Point C to Point D, he has developed some skills and expertise with regard to that.
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> MR. BUTNER: That's correct.
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> THE COURT: And that was the area, I think, that you previously said he was going to do.
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> MR. BUTNER: That's correct.
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> THE COURT: I think that that's -- he's had sufficient training to be able to do that. I don't think that he is a shoeprint expert. *I don't think that he can testify as to a pattern of what he saw* or similarity to a La Sportiva shoe that was found. I think that is more on foundational grounds and lack of disclosure. With regard to his qualifications for being a shoeprint identification expert, *following tracks from Point A to Point B and describing in terms -- general or precise, depending on whether he did any measurements -- about the direction they went, when they changed and that sort of thing, to the extent he can do that, I think is admissible.* If he had some degree of information as far as what his observations were about the pattern that was made by the shoes, that he made a note of at the time, that is fine. But if he is simply relying on photographs and saying that "The photographs look to me, as a tracker, like the same pattern as are on the bottom of the La Sportiva shoe," I don't think there is foundation for him to do that. I don't think that he is an expert to be capable of doing that, and *I would preclude that testimony -- or even to say it is similar, because I think that is getting into an expertise that he doesn't have and admittedly, at some prior hearing, it was indicated that he didn't have.*

(See April 13, 2010 Transcript 17:17-19:2, emphasis added.)

At a later hearing discussing these three witnesses' proposed impression testimony, the Court explained further that not only could these witnesses not use language such as "same" "match" or "identity," but also precluded use of terms "no differences" or "similarities" by non-experts in discussion impression evidence.

> THE COURT: As far as Winslow taking the defendant's bike tire out and being able to roll it and say, I am unable to see differences, that is the same as saying, I am able to see similarities. He is not an expert on that, and I won't allow that.

(See April 28, 2010, Transcript 169:3-7.)

At this same hearing, the State indicated that Kennedy would not be comparing the tracks from "Track 1" and "Track 2" but would instead only indicate that she tracked two sets of tracks.

> BUTNER: Similarly, Kennedy will be testifying as a tracker. And this is in regard to the shoe prints. They [Kennedy and Mascher] will be able to say, I followed the same kinds of prints, these kinds of prints, for example, in regard to the one set of prints that we believe were the killer's prints. And then I followed these kinds of prints. We believe those were the victim's shoe prints out there. There were shoes on the victim that appeared to be similar to those kinds of prints, only from the point that they had Zs on the bottom of the shoes. That is not to say that those are exactly the same shoes, but that is why they believe they were the victim's prints. We don't have that as a subject of expert testimony in this case, Judge, in terms of what they thought were the victim's prints.[4] In regard to the other prints that were followed by Mascher and Kennedy, those -- that ended up being found to be closely comparable to the La Sportiva shoes. That testimony will come from FBI witness Eric Gilkerson. But Mascher and Kennedy will and are prepared, and I would submit, we thought they were going to be allowed to testify that -- not that they had anything to do with La

[4] Since this hearing the State has late disclosed an expert report from Gilkerson that does relate Track 1 as consistent with a known shoe of Carol Kennedy's.

> Sportiva shoes, *but that they followed those prints and they were the same -- the same kinds of shoes.*

(See April 28, 2010, Transcript 165:3-166:2, emphasis supplied).

Given the Court's limitation on non-expert language regarding similarities and differences with respect to impression evidence at this hearing, the State's eventual lates identification of an expert as to possible impression comparison evidence and the State's proposed limitation of Kennedy's testimony, neither the Court nor the defense was anticipating that Kennedy would attempt, as she did on Friday, June 23, to compare prints from "Track 1" and "Track 2" or to opine for the jury that she could determine that two prints from exhibit 2520 are from different shoes. This is classic expert comparison evidence and should be stricken by this Court and limited as to any further testimony from Kennedy.

Because she is not a comparison expert, she has not been qualified and is not qualified to testify that one shoe impression "matches," "is the same as," or is "similar" to another impression. Detective Kennedy was able to track the course of Carol Kennedy's run, by progressively following an easily identifiable shoe pattern in a logical progression. In contrast, when she began to testify about what she called "Track 2," she explained that she had seen shoe prints in two separate locations—by the back fence near the victim's house and by the Glenshandra gate. If allowed, she would have offered her opinion that the two sets of prints were a match or were "similar." She would be offering a type of comparison testimony. Certainly, the photographs she took do not confirm that opinion, and until Friday the State seemed to be content to treat Detective Kennedy as a non-expert witness.

If she is not testifying as an expert, Judge Lindberg well understood that Rule 701 could not become another way for the State to introduce opinion testimony. That Rule has a clearly limited purpose. The authors of the Rules understood that on occasion a lay witness may need to use words that sound like opinion words, for the limited

purpose of explaining and making clear fact testimony. ("The car was red. Red like the color of that book on counsel's table.") Rule 701 was not designed to afford a witness who is now an expert with the ability simply to state a conclusion like "this shoe print is similar to a shoe print I saw somewhere else at the crime scene."

IV. Mascher

Scott Mascher was late disclosed as a tracking expert for the first time on January 22, 2010. On February 5, 2010, the defense moved to preclude Mascher based on late disclosure. In addition to the limitation on Mascher's tracking testimony indicated above, in another hearing on April 28 the Court also held that Mascher would not be permitted to testify as to his measurements from photographs.

> THE COURT: My understanding, based on the proffer that is made, is if Commander Mascher actually measured the prints out at the scene, then that would be admissible as an observation that he made. If he measured the prints simply in photographs, then I am not going to allow that. If his sole basis for comparison or identification of what he followed is on the basis of photographs for which he was not the photographer, I don't think that that is proper. However, if he describes the pattern that he saw in tracking, that is disclosure [sic].

(See April 28, 2010 Transcript 168:18-169:2).

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court enforce the pretrial rulings limiting tracking and other related testimony, prohibit Kennedy from further testimony regarding comparing prints from "Track 1" and "Track 2" and strike the testimony of Kennedy opining that she could determine that two prints from exhibit 2520 are from different shoes. Unless prevented from doing so, Kennedy will tell this jury that all of the impressions she described as being part of Track 2 were

made by the same shoes, which would be misleading testimony far beyond her limited are of expertise and the prior rulings of this Court.

DATED this 26th day of July, 2010.

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